

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE TONEY,

Defendant-Appellant.

UNPUBLISHED

July 3, 2001

No. 219699

Wayne Circuit Court

LC No. 98-014107

Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Defendant Bruce Toney appeals as of right his conviction of attempting to flee or elude a police officer in the fourth degree, MCL 750.479a(2); MSA 28.747(1)(2), following a bench trial. We affirm in part and remand for an evidentiary hearing on defendant's claim of ineffective assistance of counsel pursuant to *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

Defendant was charged with attempting to flee police officers after several police units stopped his car to arrest him on charges of domestic assault. Although defendant immediately pulled over, officers testified that he ignored orders to exit his vehicle and that, after one officer reached in to pull him out, he began to drive away. Defendant and his passenger claimed the vehicle never moved after defendant initially stopped. According to the officers, defendant's attempt to drive away was halted when another officer fired his gun. Defendant contends that the bullet grazed his leg and further claims the charges against him were an attempt to cover up the officer's inappropriate firing of his weapon.

Defendant argues first that the procedure whereby the circuit court appoints attorneys for indigent defendants creates a conflict of interest that inherently violated his right to counsel under Const 1963, art 1, § 20, and US Const, Am VI. However, defendant must demonstrate prejudice to prevail on a claim that his right to counsel was violated. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To establish that a conflict of interest violated his right to counsel, defendant must demonstrate an actual, rather than presumed, conflict that adversely affected his attorney's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant failed to demonstrate an actual conflict of interest; therefore, he cannot establish that his right to counsel was violated on this basis.

However, defendant also argues that his right to counsel was violated because his attorney failed to provide him with effective assistance. His constitutional right to counsel includes the right to effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Assistance is presumed to be effective, and the defendant has the burden of proving otherwise. *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). The defendant must demonstrate that the attorney's actions were objectively unreasonable and that the defendant was prejudiced as a result. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Such prejudice exists when there is a reasonable probability that the outcome of the proceeding would have been different had the attorney not made the errors. *Toma, supra* at 302-303; *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

An attorney's decision whether to call witnesses is presumed to be sound trial strategy and, therefore, reasonable. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). However, defendant has raised a significant question regarding why his trial counsel did not call two people to the stand who allegedly would have supported defendant's claim that he could not easily open his car window and door. Further, it is unclear why counsel did not offer defendant's hospital records to support his claim that the bullet grazed his leg. Counsel's strategy may have been reasonable; however, that is difficult to determine from the record.

When there was no evidentiary hearing, pursuant to *Ginther, supra* at 443-444, our review is limited to the lower court record. *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000). However, in the present case, defendant properly requested an evidentiary hearing; the circuit court denied his request. Defendant has raised sufficient questions to require a remand to the lower court for an evidentiary hearing. Therefore, this case is remanded for that purpose.¹

Defendant also claims that the evidence was insufficient to convict him of the crime charged. This Court reviews an insufficiency of the evidence claim by viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the elements of the crime were proven by a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The elements of fleeing and eluding an officer are the following: (1) the police officer was in uniform and performing his lawful duties and the vehicle was adequately identified as a police vehicle; (2) the defendant was driving a motor vehicle; (3) the officer ordered the defendant to stop through use of his hands, voice, lights, or siren; (4) the defendant knew that the officer had ordered him to stop; and (5) the defendant refused to obey by trying to flee or otherwise avoid being caught. *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999). To be convicted of attempt, the defendant must have intended to commit the crime and must have taken some action beyond mere preparation. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

The only element that defendant disputes is the intent to flee or otherwise avoid being caught. The testimony of defendant and his passenger contradicts the officers' claims that

¹ Our decision should *not* be read to limit defendant's evidentiary hearing to the two incidents discussed here, that is, the allegedly faulty window and door and the hospital records.

defendant started to drive away; however, we must resolve conflicting testimony in the prosecutor's favor when determining whether the evidence was sufficient. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Defendant's intent to drive away from the scene can be inferred from the circumstances, including his delay in exiting and the unexplained movement of his car testified to by several officers. *Grayer, supra* at 744. The evidence was sufficient to meet each element of the crime charged; therefore, defendant's argument fails.

Finally, defendant argues that he was denied his right to confront the witnesses against him because the prosecutor failed to exercise due diligence in its attempt to locate the officer who fired the shot. In light of our remand for a *Ginther* hearing, which may include an examination regarding defense counsel's action toward this witness, we decline to address this issue at this time.

Affirmed in part and remanded for an evidentiary hearing consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell